Supreme Court, U.S.
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No. 95-1328

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

FIRST NATIONAL BANK & TRUST, WIBAUX, MONTANA, and ITS STOCKHOLDERS, Thomas E. Towe Trust, Karen James Trust, Kristin Hartley Trust, Sara Horsfall Trust, Andrew C. Towe Trust, Grant Investments Fund, Irene Koch, and Dorothy Tow,
Petitioners,

v.

THE COMPTROLLER OF THE CURRENCY,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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ADDITIONAL QUESTION PRESENTED FOR REVIEW BY IMPLICATION FROM RESPONDENT'S BRIEF

7. Does the action of the Respondent constitute a taking in violation of the takings clause of the Fifth Amendment to the Constitution of the United States?

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I.

RESPONDENT DOES NOT DENY THAT A MISTAKE HAS BEEN MADE. NOR DOES IT DEAL WITH FACTS CITED BY PETITIONERS CHOOSING INSTEAD TO MAINTAIN THAT THE PUBLIC INTEREST JUSTIFIES ITS ACTIONS NO MATTER WHAT THE FACTS SHOW.

This is not a case involving the takeover of an insolvent financial institution or even a troubled bank. To the contrary, the Respondent [hereinafter "OCC"] chose to apply its recently acquired additional powers to seize a healthy bank - the strongest bank in Eastern Montana. The OCC does not deny this.

As Petitioners attempted to show in the facts set forth in their Petition (Petition at 4-13, 17), a mistake has been made which has resulted in Petitioners being erroneously deprived of their property - a mistake which would not have happened if a fair hearing had been allowed at **any step of the procedure.**[1] In the total absence of any opportunity to present evidence or cross examine

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[1]The Respondent suggests the appointment of a conservator was the product of the Comptroller's ongoing bank examination process, and the Bank had "ample opportunity" to respond to the Comptroller's concerns. The Respondent does not, however, answer the Petitioner's original charge that brand-new issues were raised for the first time within days of the takeover, and at no time did the Bank have an opportunity to respond to the critical issues raised by this proceeding, namely, whether or not the alleged violations or practices were likely to cause insolvency as required by 12 U.S.C. § 203(a)(5) or that the violation of the Cease & Desist Order was willful or continuing under 12 U.S.C. § 203(a)(7). (Petition at 20-24.)

witnesses against them, a judicial review on an arbitrary and capricious standard of the secret, one-sided determination of the facts makes a mockery of justice.

Nowhere in its Brief in Opposition does the OCC deny, (1) that a mistake has been made, (2) that Petitioners have been denied a hearing, (3) that a grave injustice has been perpetrated, (4) that conclusive documentary proof of bias on the part of their examiners exists (Petition at 10), (5) that a conflict of interest on the part of one of their examiners exists and its prejudicial impact was carried forward through internal memos (Petition at 11), (6) that the OCC gave a cash bonus and award to an employee for testifying against the Petitioners and gave substantial cash awards to a number of their employees for producing a harsh and critical, albeit unsupported, report of examination on Petitoners Bank (Petition at 13). The OCC does not even deal with these facts.

Nowhere does the OCC attempt to deal with the cogent and persuasive testimony of 31 year OCC veteran and expert, H.O."Burt" Price or seasoned State of Montana Chief examiner William Grant. (Petition at 6-12.)

Instead, the OCC contends, "the Constitution does not require a predeprivation hearing." (OCC Brief at 5.) What the OCC fails to mention is that Petitioners received no post-deprivation hearing either. The most it can state is that "the bank had failed to mend its ways" and the government "had a strong interest in moving quickly to avoid dissipation of the bank's assets." (Id. at 5-6.) What the Brief fails to state is that experts disagree that any ways needed mending and that there was

absolutely no basis to move quickly when by the government's own admission the bank had improved and was continuing to improve.

Just a few days before the takeover, the OCC upgraded the Bank's CAMEL rating from a 5 to a 4, a clear admission that the Bank was improving. (Petition at 9.) Petitioners increased the capital ratio of the Bank from 1.66% to 14.31% (over twice the national average) in 5½ short years. The OCC's decision to appoint a conservator was **not** based on the financial condition of the Bank or on any fear of the "dissapation" of its assets. As stated in that "Decision":

> As noted elsewhere in this Decision, the necessity for this conservatorship is not based on the monetary losses that the bank has thus far suffered as a result of its relationship with Grant Investments and Towe Farms, Inc. As of now, these particular transactions have not reduced the bank's capital to excessively low levels and therefore, do not, in and of themselves, threaten the continued existence of the bank.

Decision at 111 (Document submitted for filing by Respondents). Indeed, the evidence the OCC and the District Court refused to make a part of the record shows that the capital was increased substantially with the assistance of these same two organizations. (1st Aff'd of E. Towe at 1-3; Aff'd of T. Towe at A-58 to A-61.)

Further, the OCC contends "the public interest in preventing unsafe and unsound banking practices justifies" the bank's seizure without a hearing. (OCC Brief at 5.) In effect, the OCC is suggesting that it does not matter what the facts are. Put in another way, the OCC is

suggesting, "Trust us, we know what we are doing and we do not make mistakes and the public interest does not justify taking the time and effort needed to comply with Constitutional guarantees." **In other words, Bank regulators are above the law and unfettered by the Constitution.**[2]

Finally, the OCC contend that the post-appointment judicial review limited to the spoon-fed record prepared

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[2] The irony is that the very procedural guarantees Petitioners seek to establish in this case are meticulously guaranteed for all less stringent actions authorized by bank regulators. Thus, each successive regulatory procedure, leading up to the seizure of a bank or financial institution, carefully provides for procedural due process. A Cease & Desist Order cannot be imposed without an opportunity for a hearing before an Administrative Law Judge (hereinafter "ALJ"). 12 U.S.C. § 1818(b)(1). A hearing is required before an ALJ before the Federal Deposit Insurance Corporation can withdraw its insurance coverage. 12 U.S.C. § 1818(a)(2). A hearing is required before an ALJ before bank regulators can remove an officer or director from the bank or prohibit that person from engaging in banking. 12 U.S.C. § 1818(e)(4). A hearing must be held before an ALJ before bank regulators can impose civil money penalties. 12 U.S.C. § 1818(i)(2)(H). A notice and opportunity for a hearing is required before the bank regulators can issue a capital reclassification order. 12 C.F.R. § 6.4. Only the most serious action, the action of last resort, is permitted without these procedural guarantees. As Petitioners have contended throughout, it is much easier for the OCC to seize a bank, thereby avoiding the necessity for a hearing as well as depriving the stockholders of their own assets with which to respond to the false and improper accusations as well as removing the documents and witnesses from easy access to the stockholders. The OCC brought a Cease and Desist Order proceeding against the Bank in 1988 and lost with considerable embarrassment to OCC examiners which may explain why they did not try that much more appropriate procedure again.

by the OCC and including only those documents the OCC wished the courts to review, a review based on an arbitrary and capricious standard, is "adequate to assure against the risk of mistaken deprivations." (OCC Brief at 7.)

This case alone illustrates the inaccuracy of this statement. A mistaken deprivation has taken place - the OCC does not and cannot deny this fact. The post-appointment judicial review limited to the spoon-fed record of the Respondent itself is simply not adequate to assure against such mistaken deprivations. The words of this Court in United States v. James Daniel Good Real Property, 510 U.S. ___, 126 L.Ed.2d 490, 504 (1993), bear repeating:

> Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.[3]

By denying a hearing and limiting the review to the spoon fed facts the OCC wanted the OCC to see, the OCC avoids having to deal with the fact that the Bank was not in trouble financially, that the Bank was the strongest bank in Eastern Montana, that the Bank was continuing to improve, that documentary evidence of bias exists, that conflicts of interest exist which prejudiced

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[3]These words are the words of Frankfurter, J., concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-72, 95 L.Ed. 817, 71 Sup.Ct. 624 (1951) cited by this Court with approval in Good.

future examinations through internal memos, that highly questionable practices of rewarding employees (with cash payments) for testifying against the Bank exist, and that experts with much more experience and expertise than OCC examiners reviewed the same material and came to a completely different conclusion.[4] (Petition at 3-13.)

Facts are important and cannot be swept under the rug or ignored, even by bank regulators. No public interest can justify that. Such power should never be given to government officials, even bank regulators.

II.

BY INSISTING THE REGULATORY AUTHORITY JUSTIFIES DISREGARDING THE DUE PROCESS REQUIREMENTS WITHOUT ANY JUSTIFICATION OR SHOWING OF EXIGENT CIRCUMSTANCES, THE OCC HAS FURTHER FLOUTED THE CONSTITUTION AND ALSO RAISED A TAKINGS ISSUE.

In addition to the OCC's failure to deny that a mistake has been made or to grapple with the facts, the

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[4]Expert H.O."Burt" Price stated the reports and examinations were not adequately documented and those that were did not support the conclusions reached by the OCC. (Price, pp. A-86, A-87.) Using inflammatory words such as "concealed," "falsified records," "diversion of funds," and "schemes" which were factually inaccurate (Price, p. A-98) is grossly unfair unless the opposing party can introduce evidence to show they are factually inaccurate. Building on such inflammatory words, it is easy to construct a spoon-fed record sufficient to persuade a district judge that the decision was not arbitrary or capricious.

OCC also **fails to even acknowledge that exigent circumstances are an issue.** In other words, as Petitioners set forth in their Petition (pages 20-22), under Good, supra, 126 L.Ed.2d at 508-09, Fuentes v. Shevin, 407 U.S. 67, 70-71 (1972); Connecticut v. Doehr, 501 U.S. 1 (1991), the **government must show an extraordinary circumstance or exigency** that would require such immediate action that the public interest would justify disregarding some of the requirements of due process. As stated by this Court in Good, supra:

> To establish exigent circumstances, the government must show that less restrictive measures ... would not suffice to protect the government's interest.

Good, supra, 126 L.Ed.2d at 508-09. Furthermore, unlike Good or any of the other cases previously discussed by this Court, we are talking here about **no process whatsoever** - no hearing, no opportunity to cross-examine, no opportunity to present evidence, no opportunity to meet the evidence against Petitioners.

The Respondent's Brief is remarkable for its failure to even suggest a need to show exigent circumstances. Indeed, they cannot. The Bank was in far worse condition when Edward Towe became president on January 15, 1987, than it was when the OCC took over on June 25, 1992. He gradually restored the bank to full economic health, and by the time the OCC took over, it was the strongest bank in Eastern Montana - something the Respondent has never yet denied. (Petition at 4.) Furthermore, as expert H. O. Burt Price indicated, there were a number of alternative courses of action which would have been more appropriate in this case. (Price,

pp. A-104 to A-106.) Under the ruling of this Court in Good, supra, exigent circumstances cannot, therefore, be shown. Presumably, Respondent-made no attempt to do so because it knew it could not even make a good faith effort to show exigent circumstances.

Furthermore, the Respondent made absolutely no attempt to refute Petitioner's contention that the Matthews v. Eldrige[5] test was met. (Petition at 18-20.)

Under these circumstances, the Respondent has converted the regulatory authority of the OCC into a taking. By insisting the public interest allows them to seize the Bank without a hearing or without any opportunity for the owners to defend themselves, and without any showing of exigent circumstances to justify disregarding these constitutional protections, they have successfully taken Petitioners property for their own purposes. Thus, the takings clause which prohibits taking private property for public sue without just compensation has been violated. As stated by this Court in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2892-93 (1992):

> These considerations gave birth ... to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

See McAndrews v. Fleet Bank of Massachusetts, 989 F.2d 13, 17-20 (1st Cir. 1993)[6]; United States v. Causby, 328

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[5]Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[6]Although the 1st Circuit held that terminating a lease as the result of a bank seizure under FIRREA did not constitute an unconstitutional taking, the logic would dictate such a taking has taken place where

U.S. 256, 267 (1946); Portsmouth Co. v. United States, 260 U.S. 327, 330 (1922); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982); First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987); Lucas v. So. Carolina Coastal Council, 505 U.S. __, 120 L.Ed.2d 798, 812-815 (1992).

The three factors outlined in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) have all been met and satisfied under the facts of this case. The economic impact is total when the stockholders are physically removed from the Bank. The interference with investment-backed expectations are also total and the character of the governmental action, as previously stated, has exceeded the bounds of legitimate regulation when the public interest does not even allow a hearing or explanation of exigent circumstances either before or after the taking. Once the OCC acknowledges the Bank is healthy and solvent, there is no further need to protect taxpayers from the problems caused by insolvent banks or to protect the Treasury from payment on insured deposits. This argument is made effectively by Garner, Unconstitutional regulatory seizures under the FDICIA of 1991: The Final Blow to the Business of National Banks, 22 Pepperdine L. Rev. at 142-149 (1994).

The application of the takings clause to this case is underscored by the OCC itself when it suggests the relief sought by Petitioner may no longer be possible. (OCC Brief at 8, n.9.) In point of fact, the lengthy Asset Purchase Agreement specifically provides for a

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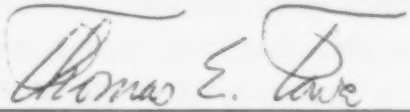
there is a total seizure of control of one's property and its economic interest as was the case in the instant case.

contingency in the event a Court ultimately rules that the sale of assets was not properly authorized, including a substantial escrow to cover that eventuality.[7] The mere assertion of this possibility further confirms that the OCC now holds the Bank for its own purposes.[8]

CONCLUSION

It is respectfully submitted the Petition for Certiorari should be granted.

Respectfully submitted this 22nd day of May, 1996.



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[7]A copy of the Asset Purchase Agreement dated June 29, 1995, is attached has Exhibit C to the Complaint in First National Bank & Trust, Wibaux, Montana, et al v. The Comptroller of the Currency, Cause No.CV 95-136-BLG-RWA, United States District Court for the District of Montana.

[8]Petitioners have seen no part of the $1.5 million "sale price" allegedly received by the OCC from the sale of these assets (at least $300,000 less than Petitioners could have received from another offer), although they have been promised some proceeds once Court proceedings under 12 U.S.C. §205(d)(2) are completed. No such proceedings have yet been commenced. Because of the discretionary exception to the Federal Tort Claims Act (28 U.S.C. § 2680(a)), the Petitioners are left with no other realistic monetary remedy.